

STATE OF MICHIGAN
COURT OF APPEALS

DAN DECAPUA,

Plaintiff-Appellant,

v

CHARLES L. BIECKER, d/b/a MIDWEST FAN
AND CLOCK CO.,

Defendant-Appellee.

UNPUBLISHED

November 19, 2002

No. 235775

Macomb Circuit Court

LC No. 00-003334-NO

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff tripped and fell outside of defendant's store. The trial court dismissed the action, ruling that the condition which caused the fall was open and obvious. Plaintiff contends that the court erred in considering photographs submitted by defendant because they were not legally admissible. Because plaintiff did not raise this issue below, it has not been preserved for appeal. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000). We therefore consider only the court's ruling as to the open and obvious nature of the condition.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Plaintiff was an invitee in that he was on defendant's premises which were held open for a commercial purpose. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604; 614 NW2d 88 (2000). A landowner is subject to liability for physical harm caused to his invitees by a condition on the land only if the owner (a) knows of, or by the exercise of reasonable care

would discover, the condition and should realize that it involves an unreasonable risk of harm to his invitees; (b) should expect that his invitees will not discover or realize the danger or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect his invitees against the danger. *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 432-433; 542 NW2d 612 (1995). This duty is not absolute. *Douglas v Elba, Inc*, 184 Mich App 160, 163; 457 NW2d 117 (1990). It does not extend to conditions from which an unreasonable risk of harm cannot be anticipated or to open and obvious dangers. *Id.*; *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 6; 535 NW2d 215 (1995).

An open and obvious danger is one that is known to the invitee or is so obvious that the invitee might reasonably be expected to discover it, i.e., it is something that an average user with ordinary intelligence would be able to discover upon casual inspection. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). A landowner does not owe a duty to protect invitees from any harm presented by an open and obvious danger unless special aspects of the condition, i.e., something unusual about the character, location, or surrounding conditions, make the risk of harm unreasonable. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-617; 537 NW2d 185 (1995). However, “only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.” *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519; 629 NW2d 384 (2001) (footnote omitted).

Plaintiff tripped over a five-gallon bucket on the sidewalk in front of defendant’s store. He was aware of the object, having seen it and avoided it as he entered the establishment. He forgot about it and did not see it as he was leaving the store because it was obscured in part by the door frame. However, that does not mean the bucket was not open and obvious because the test for an open and obvious danger is an objective one. *Hughes v PMG Building, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). Moreover, the bucket, which was directly in plaintiff’s path as he walked out, was not obscured from view once the door was open and could have been easily avoided had it been observed. In addition, the risk of tripping over the bucket and falling to the ground did not present an especially high likelihood of severe harm. *Lugo, supra*. Therefore, the trial court did not err in granting defendant’s motion.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter